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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

SYLVIA MANNING, EXECUTOR OF THE ESTATE OF HOUGHTON H. WEST,
Petitioner,

v.

AUDREY ALLISON HAYES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHERE AN EMPLOYEE BENEFIT LIFE INSURANCE POLICY, AND NOT A PENSION BENEFIT, IS OWNED BY THE EMPLOYEE PRIOR TO A FAILED MARRIAGE DOES ERISA, 29 U.S.C. § 1144(a), PRE-EMPT A STATE'S DIVORCE LAW GOVERNING DISTRIBUTION OF THE POLICY PROCEEDS?

PARTIES TO THE PROCEEDING

Petitioner

Sylvia Manning, Executor of the Estate of Houghton H. West. Petitioner is an individual and has no corporate affiliations.

Respondent

Audrey Allison Hayes

The caption contains the names of all parties to the final decision below. The issuer of the policy in question, UNUM Life Insurance Company of America, interpled the proceeds of the policy owned by Mr. West into the registry of the District Court and was dismissed before the Final Judgment and appeal to the Fifth Circuit. UNUM is not a party to this Petition.

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The Petitioner SYLVIA MANNING, THE EXECUTOR OF THE ESTATE OF HOUGHTON H. WEST[1] respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered on 19 May, 2000.

OPINIONS BELOW

In a pure summary judgment case (Fed.R.Civ.P. 56), the United States District Judge for the Southern District of Texas[2], contrary to the Texas Family Code and Fifth Circuit precedent, awarded the proceeds of an insurance policy owned by Mr. West prior to his marriage and owned by him after divorce to Ms. Hayes. The Memorandum and Order are unreported, and are reproduced here as Appendix "B". The District Court's Final Judgment is reproduced as Appendix "C".

While noting that the District Court was wrong as a matter of Fifth Circuit law, in a judgment entered on 19 May, 2000 (Fed.R.App.P. 36), the Circuit Court upheld the District Court's judgment on alternate grounds neither presented, argued, nor briefed by the parties. The Opinion is reproduced here as Appendix "A" and is reported at 212 F. 3d 866.

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[1] We will, for simplicity, throughout refer to the parties as they were married and divorced: Mr. "West" and Ms. "Hayes."

[2] The case was in Federal Court as a result of the insurance policy having been paid for by West's employer; the policy issuer removed citing the Employment Retirement Income Security Act, 29 U.S.C. §1144.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its Judgment affirming the District Court on 19 May, 2000. There was no petition for rehearing.

This Court has jurisdiction to review that judgment pursuant to 28 U.S.C. § 1254(1) (1966).

STATUTES INVOLVED

Texas Family Code § 9.301:

> (a) If a decree of divorce or annulment is rendered after an insured has designated the insured's spouse as a beneficiary under a life insurance policy in force at the time of the rendition, a provision in the policy in favor of the insured's former spouse is not effective unless:
>
> (1) the decree designates the insured's former spouse as the beneficiary:
>
> (2) the insured redesignates the former spouse as the beneficiary after rendition of the decree; or
>
> (3) the former spouse is designated to receive the proceeds in trust for, on behalf of, or for the benefit of a dependant of either former spouse.

29 U.S.C. § 1144(a):

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. . .

STATEMENT OF THE CASE

Prior to the brief and failed marriage to Ms. Hayes, as a benefit of his employment, Mr. West was the owner of a life insurance policy.

Before he and Ms. Hayes were to be married, they executed a pre-nuptial agreement. They each had substantial separate property and a prior marriage in the community property state where they were already resident and were getting married, Texas.

In that agreement each renounced any interest in the other's separate property acquired prior to the marriage.

A year into that marriage, Mr. West, as owner of the policy, designated Ms. Hayes as beneficiary. The two divorced some 18 months after his designation.

Barely a month after the divorce, Mr. West died of cancer - islet cell carcinoma of the pancreas.

After the divorce and before Mr. West's death, Ms. Hayes was not re-designated as beneficiary; not named as beneficiary in the divorce decree; nor did she claim as a trustee for a dependant. One of these situations is required by the Texas Family Code for her to have made any claim to the policy proceeds at issue.

Nevertheless, Ms. Hayes made a claim for the policy proceeds and was awarded them by the District Court, who decreed that on the legal issue a previous and controlling Fifth Circuit case from Texas was wrongly decided. This decision was affirmed by the Circuit Court of Appeals on alternate grounds.

Respectfully disagreeing, the West Estate files this Petition for Writ of Certiorari.

How The Federal Question Was Presented

After Mr. West's death, the parties could not resolve their dispute over entitlement to the proceeds of the policy owned by Mr. West prior to the marriage. The West Estate sued in the Texas courts. UNUM, the policy issuer, removed on an ERISA claim of "pre-emption" of this employee benefit. See generally 29 U.S.C. § 1001, *et seq.*; § 1144(a).

REASONS FOR GRANTING THE WRIT

This case presents an important issue requiring uniform application of federal law, namely the Employment Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* ("ERISA"). The Court has granted a *Writ* in a case decided by the Supreme Court of Washington, *Egelhoff v. Egelhoff,* No. 99-1529, where that state's Supreme Court concluded

that a Washington divorce law, essentially the same as Texas', was not pre-empted by ERISA and must be enforced.

When an employee divorces, the divorce is governed by the law of the state where the employee resides and which has exclusive jurisdiction over that event. *DeSylva v. Ballentine,* 351 U.S. 570, 580-581, 76 S.Ct. 974, 980 (1956) (citations omitted).

If an asset in a divorce property division, *e.g.* an insurance policy, happens to have been paid for by an employer as a benefit, not a pension, of employment the Labor Department in Washington cannot overwrite the law of 50 state legislatures that supervise the marriage and divorce of the residents of each one of those sovereign states. There cannot be two classes of citizen-owners of life insurance policies created by the Department of Labor based on who paid for the policy. The owner of the policy decides who is the beneficiary, not the federal government or a Federal Judge. And that owner is entitled to rely on state divorce law in making that decision. *TVA v. Hill,* 437 U.S. 153, 194-95, 98 S.Ct. 2279, 2302 (1978).

A divorce property division is a state law issue, and this Court needs to say so.

The Texas Family Code wrote Ms. Hayes out as a beneficiary to the policy Mr. West had owned. This is Texas divorce law. It controls the outcome of this case. *Brandon v. Travelers*, 18 F.3d 1321, (5th Cir. 1994) *cert. den.* 513 U.S. 1081, 115 S.Ct. 732 (1995).

This Court needs to tell the Circuits that where employee benefit insurance policy proceeds are concerned in a divorce, each state's divorce law, not ERISA, controls.

The States regulate divorce as they do marriage by legislative enactments; neither the Labor Department nor Federal Judges have any place in that process. *Egelhoff v. Egelhoff,* 139 Wash. 2d 557, 989 P.2d 80 (1999), *cert. granted* No. 99-1529.

Respectfully submitted,

/s/_____

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Filed May 19, 2000]

No. 99-20537

SYLVIA MANNING, EXECUTOR OF THE ESTATE OF HOUGHTON H. WEST,
Plaintiff-Appellant,

v.

AUDREY ALLISON HAYES, ET AL,
Defendants,

AUDREY ALLISON HAYES,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas

Before EMILIO M. GARZA, DeMOSS, and STEWART, Circuit Judges. DeMOSS, Circuit Judge:

In this insurance dispute, the estate of a deceased ERISA plan participant and the decedent's ex-wife are battling over the proceeds to an ERISA plan providing life insurance

benefits. The district court granted summary judgment in favor of Defendant-Appellee Audrey Allison Hayes, who is both the decedent's ex-wife and the named beneficiary under the policy. Plaintiff-Appellant Sylvia Manning, in her capacity as executor of the estate of Houghton H. West, appeals. We affirm, although for reasons that are substantially different than those employed by the district court.

I.

On February 15, 1993, UNUM Life Insurance Company of America issued a life insurance policy to Houghton H. West through his employer, the Amherst Securities Group. On December 22, 1994, West and Audrey Allison Hayes, in light of their impending marriage, executed a prenuptial agreement titled the Separate Property Preservation and Definition Agreement. As suggested by the title of the document, the primary purpose of the agreement was to define the substantial separate assets held by both West and Hayes, and to memorialize their agreement that neither party had or would have an equitable or legal interest in property separately owned by the other. The agreement provided that, in the event the marriage was terminated, neither party would assert any claim for such things as reimbursement, aid, comfort, or support and maintenance, and further, that neither party would assert any claim in accounts held solely in the name of the other. The agreement recognized that community property would be acquired during the marriage, primarily from earnings, and that such property would be subject to a just and equitable distribution. Finally, the agreement contained representations that each party would attempt to avoid commingling community property with separate property or the proceeds of separate property owned

by the other. Although the agreement included a non-exhaustive list of each of the parties assets, the agreement made no mention of employee benefits or insurance proceeds generally, or the Unum policy in particular.

Five days later, on December 27, 1994, West and Hayes were married. Almost one year later, on December 15, 1995, West voluntarily designated Hayes as the beneficiary on the Unum policy. West did not designate any alternative beneficiaries.

Six months later, on June 26, 1997, West and Hayes were divorced. There were no children born to the marriage. The final divorce decree holds that "no community property other than personal effects has been accumulated by the parties," and that such property is "awarded to the party having possession." The decree then states that the foregoing division was "made pursuant to the terms of the Separate Property Preservation and Definition Agreement." The divorce decree does not otherwise refer to the terms of that or any other agreement concerning the division of property or refer specifically to the Unum policy.

Less than one month later, on July 29, 1997, West died of pancreatic cancer. After West's death, Hayes claimed benefits as the named beneficiary of the Unum policy. West's estate disputed Hayes' entitlement to those benefits, arguing that Texas Family Code § 9.301 required the proceeds to be paid to the estate. Texas Family Code § 9.301 provides, in relevant part:

(a) If a decree of divorce or annulment is rendered after an insured has designated the insured's spouse as a

> beneficiary under a life insurance policy in force at the time of rendition, a provision in the policy in favor of the insured's former spouse is not effective unless:
>
> (1) the decree designates the insured's former spouse as the beneficiary;
>
> (2) the insured redesignates the former spouse as the beneficiary after rendition of the decree; or
>
> (3) the former spouse is designated to receive the proceeds in trust for, on behalf of, or for the benefit of a dependant of either former spouse.

The dispute between West's estate and Hayes was not settled, and in February 1998, Manning sued Hayes and Unum on behalf of the estate in Texas probate court, seeking a declaratory judgment that the estate was entitled to the proceeds. Unum removed on the basis of ERISA preemption. *See* Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq. Shortly thereafter, Unum interpleaded the proceeds of the policy into the registry of the district court and was dismissed, leaving only Manning, on behalf of the estate, and Hayes as parties to the suit.

In November 1998, both Manning and Hayes moved for summary judgment. Manning argued that this Court's opinion in ***Brandon v. Travelers Ins. Co.***, 18 F.3d 1321 (5th Cir. 1994), which dealt with similar facts, adopted Texas Family Code § 9.301 for purposes of the federal common law applicable in similar ERISA actions. Manning therefore argued that both ***Brandon*** and § 9.301 dictated a result in favor of the estate. Hayes argued that ***Brandon*** was both

wrongly decided at the time, because inconsistent with ERISA provisions governing competing claims for life insurance proceeds, and subsequently undermined by the Supreme Court's decision in ***Boggs v. Boggs,*** 117 S. Ct. 1754 (1996), which applied an expansive preemption analysis. Alternatively, Hayes argued that ***Brandon*** did not purport to adopt the rule codified in Texas Family Code § 9.301 for similar ERISA actions, and that the facts at issue in *Brandon* were distinguishable, such that ***Brandon*** did not dictate a result in favor of the estate in this case.

The district court considered these motions, eventually concluding that Hayes, as the named ERISA beneficiary, was entitled to the proceeds of the life insurance policy. Manning timely appealed. We review the district court's grant of summary judgment de novo. ***Clift v. Clift,*** __F.3d __, 2000 WL 373981 at *2 (5th Cir. Apr. 12, 2000).

II.

Congress passed ERISA in 1974 to establish a comprehensive federal scheme for the protection of the participants and beneficiaries of employee benefit plans. *See* 29 U.S.C. § 1001; *see also* ***Pilot Life Ins. Co. v. Dedeaux,*** 107 S. Ct. 1549, 1551 (1987); ***Shaw v. Delta Air Lines Inc.,*** 103 S. Ct. 2890, 2896 (1983). ERISA broadly preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144 (a). A law 'relates to" an employee benefit plan when the law has "a connection with or reference to such a plan." ***Shaw,*** 103 S. Ct. at 2900. The scope of the ERISA preemption provisions is "deliberately expansive," and they are consistently construed to accomplish the congressional purpose of insuring

certain minimum standards in the administration of employee benefit plans. ***See Pilot Life Ins.,*** 107 S. Ct. at 1552.

There is no doubt that Manning's claim on behalf of the estate is preempted, to the extent that it relies upon the Texas beneficiary redesignation statute. Almost every circuit court to consider the issue, including this one, has determined that a state law governing the designation of an ERISA beneficiary relates "to" the ERISA plan, and is therefore preempted. ***See Dial v. NFL Player Supplemental Disability Plan,*** 174 F.3d 606, 611 (5th Cir. *1999);* ***Brandon,*** 18 F.3d at 1325; *see also* ***Metropolitan Life Ins. Co. v. Pettit,*** 164 F.3d 857, 862 (4th Cir. 1998); ***Mohamed v. Kerr,*** 53 F.3d 911, 913 (8th Cir. 1995); ***Krishna v. Colgate Palmolive Co.,*** 7 F.3d 11, 15 (2d Cir. *1993);* ***Metropolitan Life Ins. Co. v. Hanslip,*** *939* F.2d 904, 906 (10th Cir. 1991); ***Brown v. Connecticut General Life Ins. Co.,*** 934 F.2d 1193, 1195 (11th Cir. 1991); ***McMillan v. Parrott,*** 913 F.2d 310, 311 (6th Cir. 1990); ***Fox Valley & Vicinity Constr. Workers Pension Fund,*** *897* F.2d 275, 278 (7th Cir. 1989). ***But see Emard v. Hughes Aircraft Co.,*** 153 F.3d 949, 961 (9th Cir. 1998) (holding that ERISA does not preempt California constructive trust or community property law in a dispute between a surviving and former spouse over life insurance benefits), *cert. denied sub nom.,* 119 S. Ct. 903 (1999).

The more difficult issue is whether, having established that the state law is preempted, the federal law governing the resolution of this and similar cases may be reasonably drawn from the text of ERISA itself, or must instead be developed as a matter of federal common law. There is presently a circuit split on this issue. A majority of the circuit courts to have considered the issue have recognized that ERISA does not

expressly address the circumstances, if any, in which a non-beneficiary may avoid the payment of life insurance benefits to the named beneficiary. For that reason, these courts have held that the issue is governed by federal common law. See, *e.g.*, ***Clift***, 2000 WL 373981 at *2-3; ***Brandon***, 18 F.3d at 1325-26; *see also* ***Hill v. AT&T Corp.***, 125 F.3d 646, 648 (8th Cir. 1997); ***Mohammed***, 53 F.3d at 913.

With respect to a former spouse's claim as a designated beneficiary, this Court has specifically held that the former spouse may waive his or her beneficiary status in a subsequent divorce decree or agreement, provided the waiver is explicit, voluntary and made in good faith. ***Clift***, 2000 WL 373981 at *3; ***Brandon***, 18 F.3d at 1326-27. In ***Brandon***, we held that the former spouse effectively waived her beneficiary status by virtue of explicit language in the divorce decree depriving her of any interest in the participant's employee benefit plans. *See id.* at 1323, 1327. Thus, in this Circuit, the determination of who is entitled to the proceeds of an ERISA plan providing life insurance benefits may depend upon more than merely the plan documents, and may be properly defined by reference to the federal common law of waiver as applied to the particular facts of the case.

Hayes urges a contrary rule. Hayes contends that ERISA § 1104(d) expressly requires that plan benefits be paid directly to the ERISA designated beneficiary, and further, bars any inconsistent federal common law permitting a broader inquiry. Hayes thus argues that the preemption issue is one of conflict preemption, rather than preemption under the "relates to" clause of § 1144(a).

The Sixth Circuit is the only circuit to unambiguously employ this minority approach. *See* ***McMillan v. Parrott,*** 913 F.2d 310 (6th Cir. 1990); *see also* ***Metropolitan Life Ins. Co. v. Marsh,*** 119 F.3d 415 (6th Cir. 1997); ***Metropolitan Life Ins. Co. v. Pressley,*** 82 F.3d 126 (6th Cir. 1996). The decisions of that circuit hold that ERISA § 1104(d), which simply provides that plan administrators are to discharge their duties "in accordance with the documents and instruments governing the plan," expressly provides the statutory rule for resolving competing claims to insurance proceeds. Indeed, the Sixth Circuit construes this statutory subsection to set forth a "clear mandate" that plan administrators determine the beneficiary with reference to the plan documents, and only the plan documents. *See* ***Marsh,*** 119 F.3d at 420 ("ERISA itself supplies the rule of law for determining the beneficiary."); ***Pressley,*** 82 F.3d at 130 (Section 1104(d) establishes "a clear mandate that plan administrators follow plan documents to determine the designated beneficiary."); ***McMillan,*** 913 F.2d at 312 (holding that § 1104(d) establishes the exclusive rule for determining beneficiary status). Thus, under the Sixth Circuit's minority rule, the named beneficiary must always prevail, without regard to any other circumstances or provisions of law.[1]

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[1] We note in passing that even the Sixth Circuit's application of the minority rule has, at times, been less than enthusiastic. *See* ***Pressley,*** 82 F.3d 126, 130 (6th Cir. 1996) (noting that ***McMillan*** "dictates the disposition of this case," and that the panel was "not free to reject it in favor of some other approach"); ***McMillan v. Parrott,*** 913 F.2d 310, 312 (6th Cir. 1990) (setting forth an alternative holding premised upon application of federal common law).

Hayes relies upon this analysis, as well as the Supreme Court's recent disposition in ***Boggs***, which involved a clear case of conflict preemption in a different context, for the proposition that ERISA precludes any reliance upon federal common law when resolving a dispute between a named ERISA beneficiary and another claimant. The district court essentially accepted these arguments, holding that the controlling ERISA law was to be drawn directly from ERISA § 1104(a) rather than the federal common law. The district court repudiated this Court's analysis in ***Brandon***, and opined that it was wrongly decided. The district court likewise relied upon stray language from the Supreme Court's decision in ***Boggs*** as additional support for the proposition that the federal common law can have no place when determining the beneficiary of an ERISA life insurance policy.

III.

We conclude that the district court erred. The rule announced by this Court in ***Brandon*** and recently reaffirmed in ***Clift*** is the law in this Circuit. Neither the district court nor a panel of this Court is at liberty to change that rule. Moreover, we are not persuaded, in the context of this case and premised upon the arguments made by these parties, that the rule requires any correction.

Section 1104 defines the fiduciary duties owed by the plan administrator to plan participants and beneficiaries. That section does not either expressly or implicitly purport to establish any methodology for determining the beneficiary of an ERISA plan or for resolving competing claims to insurance proceeds. Thus, considered in isolation, § 1104(d) is a very thin reed upon which to find complete conflict preemption

with respect to competing claims to life insurance proceeds. While we can certainly appreciate the simplicity of the bright line rule embraced by the sixth Circuit, that simplicity comes at too great a cost. As we noted in ***Brandon,*** the law of family relations, which includes an individual's right to expressly apportion property upon divorce, has traditionally been a fairly sacrosanct enclave of state law. *See* ***Brandon,*** 18 F.3d at 1327. Similarly, the Sixth Circuit's bright line rule that a beneficiary designation cannot be challenged would supplant what is a fairly uniform set of state laws providing that a named beneficiary who kills a plan participant in order to obtain the plan benefits is not entitled to recover those proceeds. *See* ***Emard,*** 153 F.3d at 959 n.ll (noting that forty-four states and the District of Columbia have such laws in effect). While ERISA 1144(a) requires the conclusion that the state law governing such matters is itself preempted when it relates to an ERISA plan, we have no trouble concluding, as have many of the courts that have addressed the issue, that the traditional deference given to state law in these areas supports our decision to borrow from state law when determining the federal common law that should control such claims. *See, e.g.,* ***Clift,*** 2000 WL 373981 at *3; ***Mohamed,*** 53 F.3d at 913; ***Brandon,*** 18 F.3d at 1325. In sum, ERISA is broad enough in its preemptive scope to accomplish the purposes of ERISA; namely the imposition of adequate safeguards with "respect to the establishment, operation, and administration" of employee benefit plans for the benefit of ERISA plan participants and beneficiaries. *See* 29 U.S.C. § 1001(a). There is no additional need to breathe imaginary preemptive effect with respect to competing claims for life insurance benefits into general provisions addressing another topic altogether.

Neither is a contrary approach required by ***Boggs***. In ***Boggs***, two parties asserted competing claims to the pension benefits of one Isaac Boggs after his death in 1989. Boggs' sons from a prior marriage claimed entitlement to the pension benefits by virtue of their deceased mother's testamentary transfer of her state law community property interest in Boggs' undistributed pension benefits. Boggs' surviving wife claimed entitlement to the pension benefits by virtue of ERISA § 1055, which mandates that covered pension plans protect the interests of surviving spouses by providing benefits in the form of a qualified joint and survivor annuity, and ERISA § 1056, which provides that the benefits due under a covered pension plan are inalienable and unassignable, absent a qualified domestic relations order (QDRO) meeting certain statutory requirements.

Recognizing that ***Boggs*** was positioned "at the intersection of ERISA pension law and state community property law," 117 S. Ct. at 1760, the Supreme Court held that "[t]he surviving spouse annuity and QDRO provisions, which acknowledge and protect specific pension plan community property interests, give rise to the strong implication that other community property claims are not consistent with the statutory scheme," 117 S. Ct. at 1763. The Supreme Court noted that Congress significantly strengthened the specific statutory protection afforded surviving spouses against competing interests by amending the statute in 1984. *See id.* at 1761. The Supreme Court then employed a conflict preemption analysis to hold that Louisiana community property law permitting a testamentary transfer of a former spouse's community property interest in the undistributed pension benefits of her former spouse, who remarried prior to death, was completely preempted by contrary provisions of

ERISA that were plainly intended to provide an income stream to surviving spouses that was both inalienable and immune to competing interests absent compliance with the specific statutory framework for preserving such interests with a QDRO. *See id.* at 1763-66.

Hayes maintains, and the district court at least implicitly held, that ***Boggs*** somehow undermines this Court's analysis and reliance upon federal common law in ***Brandon***. We disagree. The principles at work in ***Boggs*** are clearly inapplicable in this case. As an initial matter, this case does not involve either pension benefits or the express provisions of ERISA ensuring special protection to surviving spouses in the context of pension benefits. Both ERISA § 1055 and ERISA § 1056 are facially limited in application to pension plans, and neither section purports to have any application with respect to competing claims to benefits under a non-pension employee welfare plans, such as the life insurance policy at issue here. *See* 29 U.S.C. §§ 1055, 1056; *see also* ***Brandon***, 18 F.3d at 1324 (characterizing employer-provided life insurance policies as "welfare plans" within the meaning of 29 U.S.C. § 1002(1)). Of equal importance, this case does not involve the assertion of any community property interest. Hayes is not asserting a community property interest. To the contrary, Hayes is the designated beneficiary under the plan. For that reason, those ERISA provisions that have been construed to protect those interests of a former spouse that are inconsistent with plan documents or other ERISA provisions, provided those interests are preserved in a QDRO, are simply inapplicable to this dispute.[2] Likewise, the estate does not

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[2] The district court seems to have confused these facts in its written decision. For example, the district court recognized that

claim entitlement on the basis of a community property interest. Rather, the estate seeks to void West's designation of beneficiary by virtue of the statutory presumption erected by Texas Family Code § 9.301, and then to rely instead upon Texas law governing the distribution of assets in the absence of such a designation. As should be apparent, ***Boggs*** dealt with a clearly distinguishable situation involving explicit ERISA provisions addressing an issue plainly within the express regulatory provisions of the statute. In sum, we are not persuaded that ***Boggs*** requires any more expansive view of the discrete ERISA preemption issue presented in ***Brandon***.

The district court's broad reliance upon § 1104 for the proposition that ERISA expressly requires payment to a named beneficiary without regard any other circumstances and without resort to federal common law reflects nothing more than an inappropriate reliance upon the Sixth Circuit's minority position, which has been soundly rejected by this Circuit and a majority of other circuits to consider the issue. Similarly, the district court's reliance upon Boggs is without

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the statutory provisions protecting surviving spouses were inapplicable here, although it premised that observation upon the fact that West did not remarry, rather than upon the fact that Manning's claims do not involve pension benefits. Similarly, the district court noted that ERISA generally requires that a former spouse preserve his or her interest in plan benefits by obtaining a QDRO, but noted that Hayes' non-compliance with those provisions could be excused in this case, not because she is the named beneficiary who has no need to preserve her consistent interest, but because West did not choose to remarry in the month following the date upon which his divorce decree became final.

support; ***Boggs*** does not provide any rule of law that may be applied to this case. For the foregoing reasons, we conclude a reconsideration of the legal principles set forth in ***Brandon*** and recently reaffirmed in ***Clift*** is neither appropriate nor desirable.

IV.

Having ascertained that our Circuit follows the majority approach by applying federal common law to disputes between a non-beneficiary claimant and the named ERISA beneficiary to life insurance proceeds, and that neither the express language of ERISA nor the Supreme Court's decision in ***Boggs*** require that we abandon that approach, we must now determine the content of the applicable federal common law.

Manning correctly notes that federal common law may be determined by reference to analogous state law. *See* ***Wegner v. Standard Ins. Co.***, 129 F.3d 814, 818 (5th Cir. 1997); ***Sunbeam-Oster Co., Inc. Group Benefits Plan for Salaried and Non-Bargaining Hourly Employees v. Whitehurst***, 102 F.3d 1368, 1374 n. 18 (5th Cir. 1996); ***Jones v. Georgia Pacific Corp.***, 90 F.3d 114, 115 (5th Cir. 1996); ***Todd v. AIG Life Ins. Co.***, 47 F.3d 1448, 1451 (5th Cir. 1995). Manning then argues on behalf of the estate that this Court incorporated the requirements of the Texas redesignation statue, Texas Family Code 9.301, into the federal common law in ***Brandon.***

We disagree. While it is true that we used the Texas statute as a starting point, holding that we would "adopt the Texas rule creating a presumption of waiver absent

redesignation following divorce," ***Brandon,*** 18 F.3d at 1326, we recognized that "wholesale adoption of the Texas redesignation statute" would not "sufficiently protect the interests of [ERISA] beneficiaries," ***id.*** at 1326. We therefore modified that rule by requiring that any waiver by a designated beneficiary of ERISA life insurance proceeds be "explicit, voluntary, and made in good faith." ***Id.*** at 1327. Moreover, we measured the adequacy of the asserted waiver under this modified standard with reference to the existing federal, rather than state, common law. ***See Brandon,*** 18 F.3d at 1326-27 (discussing ***Lyman Lumber Co. v. Hill,*** 877 F.2d 692 (8th Cir. 1989) and ***Fox Valley & Vicinity Constr. Workers Pension Fund,*** 897 F.2d 275 (7th Cir. 1989)). We therefore reject Manning's argument that ***Brandon*** necessarily requires a result in favor of the estate because we incorporated the Texas redesignation statute into the federal common law when deciding that case. To the contrary, whether the estate is entitled to the proceeds of the life insurance policy must be determined with reference to the express contractual language purporting to establish Hayes' waiver, as well as any other factual circumstances bearing upon whether that waiver was intentionally and voluntarily made in good faith. *See* ***Brandon,*** 18 F.3d at 1322, 1327 (discussing divorce decree provisions as well as other facts bearing upon the issue of waiver).

V.

Brandon provides the rule of federal common law applicable to this dispute. That rule is that a named ERISA beneficiary may waive his or her entitlement to the proceeds of an ERISA plan providing life insurance benefits, provided that the waiver is explicit, voluntary, and made in good faith.

The final question requiring our consideration is whether Hayes in fact waived her beneficiary status.

There does not appear to be any issue relating to whether the parties acted voluntarily or in good faith when signing the prenuptial agreement that is made the basis of Manning's waiver argument. To the contrary, the sole issue appears to be whether the express provisions of that agreement establish Hayes' explicit waiver of her status as the named ERISA beneficiary under the Unum policy as a matter of law.

Manning asserts that Hayes waived her interest in the policy as a matter of law by signing the prenuptial agreement, which was later made the basis of the property division ordered by the divorce decree. Hayes responds that the prenuptial agreement is incompetent to waive her interest in the policy because it was executed prior to the creation of her interest as a designated beneficiary and because the document does not explicitly waive her interest in either West's employee benefit plans or the Unum policy in particular.

In deciding this issue, we are guided by the treatment given analogous waiver language in the existing precedent. In ***Brandon*** and ***Clift***, we held that former spouses effectively waived their interest in the proceeds of ERISA life insurance policies by virtue of explicit language appearing in the divorce decrees. In ***Brandon***, the divorce decree expressly divested the former spouse of any interest in or claim to:

> Any and all sums, whether matured or unmatured, accrued or unaccrued, vested or otherwise, together with all increases thereof,

> the proceeds therefrom, and any other rights relating to any profit-sharing plan, retirement plan, pension plan, employee stock option plan, employee savings plan, accrued unpaid bonuses, or other benefit program existing by reason of Petitioner's past, present, or future employment.

Brandon, 18 F.3d at 1323. In ***Clift***, a more obvious case of waiver, the divorce decree expressly divested the former spouse of any interest in or claim under "any and all policies of life insurance (including cash value) insuring the life" of her former husband. ***Clift***, 2000 WL 373981 at *4.

Although neither case technically involves life insurance benefits, we have likewise invoked the Eighth Circuit's decision in ***Lyman Lumber v. Hill***, 877 F.2d 692 (8th Cir. 1989), and the Seventh Circuit's decision in ***Fox Valley & Vicinity Constr. Workers Pension Fund***, 897 F.2d 275, 278 (7th Cir. 1989), when measuring the adequacy of an alleged waiver of beneficiary status under federal common law. *See* ***Brandon***, 18 F.3d at 1326.

In ***Lyman Lumber***, a former spouse, who was also the named beneficiary, claimed benefits under her deceased husband's ERISA profit-sharing plan. Her claim was opposed by a contingent beneficiary, who relied upon the terms of the divorce decree, which provided that the husband would "have as his own, free of any interest" of the former spouse, "his interest in the profit-sharing plan of his employer." ***Lyman Lumber***, 877 F.2d at 693. The Eighth Circuit held that the divorce decree was adequate to divest the former spouse of any shared ownership interest under the profit-sharing plan,

but that the divorce decree was not adequate, absent specific language mentioning the beneficiary interest, to divest the former spouse of her status as plan beneficiary. ***See id.*** at 693-94. Thus, the ***Lyman Lumber*** court found no waiver.

In ***Fox Valley,*** a former spouse, who was also the named beneficiary, claimed entitlement to the proceeds of a lump sum death benefit under the deceased participant's ERISA pension plan. Her claim was opposed by the participant's mother, who claimed that the former spouse had waived her interest in the pension plan by virtue of language in the divorce decree, which provided:

> The parties each waive any interest or claim in and to any retirement, pension, profit-sharing and/or annuity plans resulting from the employment of the other party.

Fox Valley, 897 F.2d at 277. The ***Fox Valley*** court held that the preceding language was adequate to waive the former spouse's interest in the lump sum death benefits payable pursuant to the deceased participant's pension plan. ***Id.*** at 282.

Underlying the result in each of these cases is a focus upon the specificity or explicitness of the language used to affect the alleged waiver. ***Clift*** presents the easiest case, given that the former spouse expressly waived any interest in life insurance policies insuring the life of her former husband. The case is also instructive because in ***Clift,*** we did not distinguish between an interest in the life insurance policy and beneficiary status under that policy, as the Eighth Circuit did in ***Lyman Lumber.*** Indeed, ***Clift*** expressly declined the

Seventh Circuit's lead in this regard, by rejecting a former spouse's invitation to hold that magic words, such as a right to "proceeds" or a "beneficiary interest" must be included in a valid waiver. The Court explained that, while waiver will not be presumed in the absence of fairly explicit language setting forth the waiver, neither is any particular formulation required. ***See Clift,*** 2000 WL 373981 at *3-4. Rather, the Court clarified that the Court "will only find waiver if, upon reading the language in the divorce decree, a reasonable person would have understood that" the beneficiary was "waiving [his or] her beneficiary interest in the life insurance policy at issue." ***Id.*** at *4. ***Brandon*** and ***Fox Valley*** serve as examples of less obvious, but nonetheless adequate, waivers. In both of those cases, the courts were persuaded by divorce decrees that explicitly divested the former spouse of any interest arising from the employment of the participant spouse. Thus, although we must eschew any mechanistic formulation of the language required to cause a valid waiver, the inclusion of language explicitly divesting a former spouse of an interest in any and all employee benefit plans of the other is probably sufficient to support an alternative beneficiary's claim that the former spouse waived his or her beneficiary status.

Applying these principles to this case, we find no waiver. The prenuptial agreement was executed prior to the time that Hayes was designated as beneficiary under the policy. The clear purpose of the document, as reflected by the title, was to define and provide for the preservation of separate property brought to the marriage. The broad language waiving West's and Hayes' interests in the other's "property" does not in any manner either explicitly or implicitly contemplate waiver of a subsequently acquired

beneficiary interest in a life insurance policy.

Manning suggests that the prenuptial agreement was incorporated into the divorce decree, such that the terms of that agreement were revived and applied to the parties' then-existing interests. We disagree. As an initial matter, the divorce decree does not purport to incorporate or revive the terms of the prenuptial agreement. To the contrary, the divorce decree provides that there is no community property to be divided aside from personal effects, and that that property would be awarded to the person in possession. The divorce decree then provides that the foregoing division, i.e. that each party retained their own personal effects, was made pursuant to the Separate Property Preservation and Definition Agreement. The divorce decree does not provide that either West's or Hayes' interests were otherwise being divided in accordance with that agreement.

Moreover, even if we agreed that the divorce decree effectively divides the parties' after-acquired interests in accordance with the prenuptial agreement, we would still find no waiver here. While the prenuptial agreement is broadly drafted, there is nothing in that agreement either implicitly or explicitly addressing either insurance or employee benefits. Likewise, and as set forth above, there is nothing in the agreement that would have placed a reasonable person on notice that Hayes was waiving her after-acquired beneficiary interest in the Unum life insurance policy. See ***Clift***, 2000 WL 373981 at *4.

To conclude, we have not found any cases holding that an agreement negotiated prior to marriage for the purpose of defining and preserving separate property is effective to

negate an insured spouse's subsequent and voluntary decision to designate the other spouse as a named beneficiary under an ERISA plan. We do not say that such an agreement would never suffice, but something substantially more than the tangential and obscure references to each of the parties "property" rights would have to be present to support a finding of waiver. The divorce decree in this case is likewise inadequate to revive the preclusive effect of the agreement, if any. The divorce decree relies upon and invokes the agreement solely for the purpose of clarifying that there is no community property and therefore no property to be divided by the family court. The divorce decree does not purport to revive the various provisions of the agreement for the purpose of precluding Hayes' claim to benefits pursuant to her status as the designated beneficiary of West's life insurance policy. For these reasons, we find no waiver of Hayes' interests, and affirm the district court's holding that Hayes is entitled under ERISA and subject to the terms of the plan to recover the proceeds of the Unum life insurance policy.

CONCLUSION

The district court is affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Filed May 5, 1999]

CIVIL ACTION NO. H-98-803

SYLVIA MANNING, EXECUTOR OF THE ESTATE OF HOUGHTON H WEST, *Plaintiff*	)
v.	)
AUDREY ALLYSON HAYES, UNUM LIFE INSURANCE COMPANY OF AMERICA, AND FORTIS BENEFITS INSURANCE COMPANY, *Defendant*	)

MEMORANDUM AND ORDER

Pending before the Court in the above referenced declaratory judgment and interpleader action to recover benefits under a group life insurance policy, removed from state Probate Court by Defendant Unum Life Insurance Company of America ("Unum") based on preemption by the Employee Retirement Income Security Act of 1974

("ERISA"), 29 U.S.C. § 1144, are a motion for summary judgment filed by Plaintiff Sylvia Manning, Executor of the estate of Houghton H. West, (instrument #15) and Defendant Audrey Allyson Hayes' counter-motion for summary judgment (#19).

Plaintiff/Executor Sylvia Manning seeks a declaration that the Estate of Houghton H. West ("the estate") is the beneficiary of life insurance proceeds, also claimed by Defendant Audrey Allyson Hayes ("Hayes"), divorced spouse of Houghton H. West ("West").

The facts in this case of first impression are undisputed. Summary judgment is appropriate if "there is no genuine issue as to any material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986), quoting Federal Rule of Civil Procedure 56(c). The sole issue here is the application of law.

During her marriage to West, Hayes was the designated beneficiary under West's group life insurance policy number 373482, an employee welfare benefit plan provided by West's employer Amherst Securities, Inc. and issued by Unum, as well as for survivors' benefits under his disability insurance policy issued by Fortis Benefits Insurance Company under the policy terms.[1] West and Hayes were

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[1] Within the declaratory judgment action, Defendant Unum filed an interpleader action, with Plaintiff and Hayes as claimants, pursuant to 29 U.S.C. 1132 and Texas Rule of Civil Procedure 43. After removal based on ERISA preemption, the stakeholder Unum was dismissed from the suit. Instrument #14. Manning and Fortis Benefits Insurance have since settled their dispute and been

divorced on June 25, 1997 pursuant to a Final Decree of Divorce signed on June 26, 1997. Plaintiff maintains that by the divorce decree their property was divided in accordance with a pre-nuptial agreement, "Separate Property Preservation and Definition Agreement," that they had entered into on December 22, 1994[2] and that stated that the insurance policy in dispute was the property of and belonged to West[3] West died on July 29, 1997

Plaintiff's motion for summary judgment argues that under § 3.632 of the Texas Family Code, in effect on the date of the divorce, West's prior designation of Hayes as beneficiary under his life insurance policy was automatically revoked and his insurance benefits were therefore payable to his estate, not to Hayes. Texas Family Code § 9.301, the successor statute to § 3.632, provides that if a decree of divorce is rendered after an insured has designated the insured's spouse as the beneficiary under a life insurance policy, that designation is not effective unless it was either redesignated in the divorce decree or the insured redesignated it after the rendering of the divorce decree. Neither act occurred in the instant case. See Sever v. Massachusetts Mutual Life Ins. Co., 944 S.W.2d 486 (Tex. App.--Amarillo 1997, writ denied) (relying on the predecessor statute to § 9.301, Texas Family Code, Art. 3.632, the court held that

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dismissed. See instrument #10.

[2] West and Hayes were married on December 27, 1994.

[3] Copies of the documents in dispute have been submitted by Hayes.

because the designation was rendered ineffective by operation of law and a secondary beneficiary had not been designated, the policy proceeds were payable to the estate of the deceased).

Second, Plaintiff maintains that Hayes is not entitled to the proceeds on any other grounds. In Brandon v. Travelers Ins. Co., 18 F.3d 1321 (5th Cir. 1994), cert. denied, 513 U.S. 1081 (1995), in a similar fact situation to the instant case's, the Fifth Circuit affirmed a summary judgment against the deceased's former wife.[4] Emphasizing

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[4] Because Plaintiff fails to explain how the Fifth Circuit reached its determination and because the reasoning is significant in understanding the evolving and disputed law in this area, the Court will do so.

After concluding, like all other courts that had resolved the issue, that ERISA preempted the Texas statute requiring an employee after divorce to redesignate his ex-spouse as beneficiary on a life insurance policy to maintain her beneficiary interest, the Fifth Circuit determined that ERISA does not address the questions of how beneficiaries are designated and whether benefits were waived in the divorce decree. 18 F.3d at 1325. Noting that the circuits are split as to whether ERISA or federal common law supplies the rule of law under such circumstances, because it decided that ERISA does not address the beneficiary issue, the Fifth Circuit applied federal common law, which in turn, if not clear, can draw on and adopt analogous state family law. Observing that federal courts have long respected state domestic relations law, "a sacrosanct enclave, carefully protected against federal intrusion," it found that there is a strong presumption that family state law be given precedence. 18 F.3d at 1326. It therefore adopted the Texas rule, embodied within Texas Family Code

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Annotated § 3.632, creating a presumption of waiver in the absence of redesignation of the ex-spouse as beneficiary after divorce. Id. Nevertheless, in order to protect the interests of the beneficiary, it explicitly modified its adoption of the state law "to require that any waiver be voluntary and in good faith." Id.

The Fifth Circuit, id. then reviewed the Eighth Circuit's decision in Lyman Lumber Co. v. Hill, 877 F.2d 692, 693 (6th Cir. 1989). In that suit the divorce decree recited that the husband "shall have as his own, free of any interest of [his ex-wife], his interest in the profit sharing plan of his employer." The court held that this general language was not sufficient to revoke the wife's interest and that the wife had not effectively waived her right to his employee benefits because there were no terms "specifically divesting the spouse's rights as a beneficiary under the policy or plan."

Next the Fifth Circuit reviewed Fox Valley & Vicinity Construction Workers' Pension Fund v. Brown, 897 F.2d 275 (7th Cir. 1990) (en banc), cert. denied, 498 U.S. 820 (1990). Brandon, 18 F.3d at 1327. In Fox Valley, the waiver executed by the wife in the divorce settlement stated that "[t]he parties each waive any interest or claim in and to any retirement, pension, profit-sharing and/or annuity plans resulting from the employment of the other party." Fox Valley, 897 F.2d at 277. The Seventh Circuit decided that "[u]nlike the factual setting in Lyman, [the spouses] in the present case signed a voluntary property settlement agreement that included an explicit mutual waiver of any rights each might have had in the other's pension plan." Id. at 280.

The Fifth Circuit concluded that it would follow Lyman Lumber and Fox Valley in permitting a very specific divorce decree to waive an ex-spouse's rights to a benefit, but "requiring under federal common law that any waiver of ERISA benefits be

federal common law's deference to domestic family concerns, traditionally a state law domain, the panel determined under

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explicit, voluntary, and made in good faith." Brandon, 18 F.3d at 1327.

In Brandon, the divorce decree specifically provided in relevant part, id. at 1323,

> Petitioner [Richard Brandon] is awarded the following as Petitioner's sole and separate property, and Respondent [Wanda] is divested of all rights, title, interest, and claim in and to such property . . . (8) Any and all sums, whether matured or unmatured, accrued or unaccrued, vested or otherwise, together with all increases thereof, the proceeds therefrom, and any other rights relating to any profit-sharing plan, retirement plan, pension plan, employee stock option plan, employee savings plan, accrued unpaid bonuses, or other benefit program existing by reason of Petitioner's past, present, or future employment.

Finding that Wanda Brandon deliberately chose not to hire an attorney and to stay away from the divorce court, and that the settlement was generous to her interests, the Fifth Circuit further found that she failed to raise a genuine issue as to the voluntary nature and good faith basis of the waiver of her right and affirmed the district court's determination that through the divorce decree she had waived her rights to the life insurance proceeds even though the husband had never changed the designation of her as beneficiary on his life insurance policy.

federal common law, respecting the state statute, Texas Family Code Art. 3.632, that redesignation of beneficiary was essential for the former spouse to receive policy benefits because the statute created a presumption of waiver absent redesignation following divorce.[5]

Plaintiff further requests an award of attorney's fees under Texas Civil Practices & Remedies Code § 37.001 et seq. because this action was originally brought in Probate Court I of Harris County, Texas under the Texas Declaratory Judgment Act. Texas Civil Practice and Remedies § 37.009 provides that the Court may award costs and reasonable and necessary attorney's fees as are equitable and just. Plaintiff asserts that despite repeated demands by Plaintiff, Hayes has refused to cooperate and insisted that she is entitled to the insurance proceeds contrary to state and federal law. Counsel for Plaintiff provides an affidavit supporting her request for $16,062.50 in attorney's fees and $215.00 in out of pocket expenses.

In her memorandum in opposition, Hayes emphasizes that ERISA controls this action and preempts state law under Section 1144(a). "Beneficiary" is defined by § 3(8) of ERISA, 29 U.S.C. § 1002(8), as "a person designated by a participant or by terms of any employee benefit plan who is

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[5] Observing that the "oversight of the family courts is suitably armored to protect the rights at stake in this case" and that "[p]arties in divorce litigation often trade and exchange their property with one another," the Fifth Circuit found that Wanda Brandon's divorce decree was a bona fide waiver of her rights to the insurance policy proceeds. 18 F.3d at 1327.

or may become entitled to a benefit thereunder." Coleman v. Champion International Corp., 992 F.2d 530, 533 (5th Cir. 1993). Under 29 U.S.C. § 1002(a), a "beneficiary" is defined as "a person designated by a participant or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." Under section II--Definitions of West's group life insurance plan, "beneficiary" is defined as "the person or persons designated by an employee to receive the benefits of his life insurance and accidental benefits upon his death." Hayes contends that while she concedes that she could not have been a beneficiary without consent of an existing second spouse, West did not remarry, so there is no impediment to her continuing to be the designated beneficiary. 29 U.S.C. § 1055(c) (2).[6] She further maintains that the

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[6] Section 1055(c), "Plans meeting requirements of section," provides as follows,

> (1) A plan meets the requirements of this section only if--
>
> (A) under the plan, each participant--
>
> (i) may elect at any time during the applicable election period to waive the qualified joint and survivor annuity form of benefit or the qualified preretirement survivor annuity form of benefit (or both), and
>
> (ii) may revoke any such election at any time during the applicable election period, and
>
> (B) the plan meets the requirements of paragraphs (2), (3), and (4).
>
> (2) Each plan shall provide that an election under paragraph (1)(A)(i) shall not take effect

estate has no standing to seek payment of the proceeds because only participants, beneficiaries, and fiduciaries have standing to claim benefits under ERISA. Boggs v. Boggs, 520 U.S. 833, 117 S. Ct. 1754 (1997) (sons of deceased former wife have no claims to benefits to be received by surviving wife).[7] Hayes maintains that Brannon is

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> unless--
> (A) (i) the spouse of the participant consents in writing to such election,
> (ii) such election designates a beneficiary (or a form of benefits) which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the participant without requirement of further consent by the spouse, and (iii) the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public, or
> (B) it is established to the satisfaction of a plan representative that the consent required under subparagraph (A) may not be obtained because there is no spouse, because the spouse cannot be located, or because of such other circumstances as the Secretary of the Treasury may by regulations prescribe.

[7] Section 502(a) of ERISA, 29 U.S.C. § 1132(a) creates a cause of action for only plan participants, beneficiaries, fiduciaries, and the Secretary of Labor to challenge a denial of

benefits. Coleman v. Champion Int'l Corp./Champion Forest Prods., 992 F.2d 530, 533 (5th Cir. 1993); Boggs, 520 U.S. at, 117 S. Ct. at 1763. The Court would point out that if this Court determines that ERISA provides the rule of law, that statute, the provisions of the plan, and the viable designation of the plan document determine whether Hayes is the beneficiary.

If ERISA does control, the Court concludes that the estate has standing to bring this civil suit to recover benefits under the ERISA-qualified plan. In Coleman v. Champion Intern. Corp./Champion Forest Products, 992 F.2d 530 (5th Cir. 1993) in his capacity as the son, heir and representative of the estate of a deceased plan participant, Tony Coleman brought a suit under ERISA challenging the employer and others of inadequate notice to the participant of his plan rights and options. The plan offered participants several options for payment of pensions. According to the current Pension Summary Plan Description, the payment option with the largest monthly income was the "Lifetime Only Income," which paid benefits only during the participant's life, not after his death. The "Lifetime Only Income" was the normal option for participants unmarried at the time of death, and the plan paid all benefits under this option unless the participant specifically requested otherwise.

When he terminated employment, the participant, Charlie Coleman, was divorced, had never remarried, nor had he elected to go into pay status, nor elected any form of optional payment, nor designated a beneficiary to receive benefits under one of the optional forms of payment after his death. The plan specifically stated that if an unmarried, terminated, vested participant like Charlie Coleman died before going into pay status, the plan would not pay any pension benefits.

When the Fifth Circuit examined the issue of the son's

inapplicable because the Supreme Court in Boggs rejected the approach of an ad hoc state common law overlay of ERISA to

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standing to sue the employer under ERISA, it noted that Tony did not meet the definition of beneficiary under § 1132(a) and that he had never been a "plan participant" or "fiduciary" under § 1002(7) or § 1002(21). Because the son, although the father's executor, had never been designated by Charlie Coleman as a beneficiary, the Fifth Circuit concluded that his status depended on the language and terms of the plan. It pointed to the plan language specifically providing that if an unmarried, terminated participant died before he began to receive his pension, no pension benefits were payable or owing. Because no pension benefits were therefore payable at the time of Charlie Coleman's death, the employer's pension committee was not authorized to name a beneficiary.

In contrast in the instant case, West's plan specifically provides under section "J," "Payment of claims,

> Payment may be made to the executor or the administrator of the employee's estate if:
>
> i. an employee dies without having designated a beneficiary; or
>
> ii. no designated beneficiary survives the employee.

Thus, under Coleman and the terms of the plan, this Court concludes that if under ERISA Hayes is no longer a designated beneficiary of West's life insurance proceeds, Manning as executor of the estate may receive such payments.

If ERISA does not control, and federal common law does, the standing issue under ERISA is irrelevant.

fill in interstitial gaps in ERISA on a case-by-base and state-by-state basis. 117 S. Ct. at 1760 (any conflict between ERISA and state claw is resolved in favor of ERISA).

Because of ERISA preemption, Hayes relies on provisions of ERISA (29 U.S.C. § 1055(c) (2) (A)) and complementary provisions of the Internal Revenue Service (26 U.S.C. § 417(a) (2) (A) (i)[8] to show there is no ERISA-

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[8] For a designated beneficiary to waive rights to proceeds under an employee benefit plan insurance policy, Internal Revenue Code ("IRC"), 26 U.S.C. § 417(a) (2) (A) (i), requirements are as follows:

i. The spouse of the participant consents in writing to such election,

ii. Such election designates a beneficiary (or form of benefits) which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by a participant without requirement of further consent of the spouse, and

iii. The spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public.

As quoted in footnote 6, ERISA's Section 1055(c) (2) (A) (i) essentially mirrors the same requirements.

Challenging Plaintiff's contention that the terms of the divorce decree and prenuptial agreement control the property distribution, Hayes points out that in addressing the IRC section

authorized waiver of her right to the proceeds as designated beneficiary.

Hayes maintains that she has not relinquished her designation as a beneficiary. She contends that Plaintiff Manning does not support Plaintiff's contention that the property in question was divided according to the prenuptial agreement and that the policy was the property of West.

Even if the federal common law approach of Brandon had not been superseded by Boggs, Hayes further insists that Plaintiff's reliance on and characterization of Brandon misrepresent the case and take the alleged holding out of context. She quotes from Brandon, 18 F.3d at 1326,

> In this case, as urged by Abbott, we adopt the Texas rule creating a presumption of waiver absent re-designation following divorce. Tex. Fam. Code Ann. Sec. 3.632. However, in

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above, Treasury Regulation § 1.401(a)-(20) in question and answer form deals with anti-nuptial agreements, such as the prenuptial agreement between West and Hayes:

> Q-28. Does consent contained in an anti-nuptial agreement or similar contract entered into prior to marriage satisfy the consent requirements of Sections 401(a) (11) and 417 [of the IRC]?
>
> A-28. No. An agreement entered into prior to marriage does not satisfy the applicable consent requirements, even if the agreement is executedwithin the applicable election period.

> looking to state family law for guidance, we recognize that wholesale adoption of the Texas redesignation statute will not sufficiently protect the interests of beneficiaries. Thus, in our fashioning of federal common law, we modified the adoption of state law to require that any waiver be voluntary and in good faith. Our approach is bolstered by [Lyman Lumber Co. v. Hill, 877 F.2d 692, 693 (5th Cir. 1989)], in which the 8th Circuit took a similar tact in utilizing modified state law to breathe life into the federal common law.

The Fifth Circuit then held that the statement that the employee "shall have as his own, free of any interest of [his ex-wife], his interest in the profit sharing plan of his employer," was not sufficient to revoke the ex-wife's designated beneficiary interest. Neither the divorce decree nor the agreement contains Lyman Lumber language that would remove her as the designated beneficiary of policy proceeds, insists Hayes.

Hayes cites a pre-Boggs decision, Hurwitz v. Sher, 982 F.2d 778, 779 (2d Cir. 1992), cert. denied, 508 U.S. 912 (1993), which examined the following language of waiver in a pre-marital agreement:

> [E]ach party hereby waives and releases to the other party and to the other party's heirs, executors, administrators and assigns, any and all rights and causes of action which may arise by reason of the marriage between the parties with respect to any property, real or personal,

> tangible or intangible . . . now owned or hereafter acquired by the other party, as fully as though the parties had never married ....

The Hurwitz court held that such language did not constitute an effective waiver of ERISA-covered death benefits under an employee benefit plan.

Thus, sums up Hayes, the motion for summary judgment must be denied because it relies upon ERISA pre-empted state statutory authority and the erroneous efforts of the Brandon court to establish a federal common law contrary to ERISA. Furthermore, Hays argues that her own motion for summary judgment must be granted because there has been no waiver, as required by ERISA, of her interest in the plan-provided death benefits.

Hayes also requests attorney's fees in the amount of $1,875.00 as an equitable and just award under Tex. Civ. Prac. & Remedies Code Annotated § 37.009. Nevertheless, in a supporting affidavit, her counsel requests $6,250.00. Her counter motion for summary judgment further seeks a declaration that the insurance proceeds, currently in the Court registry, by effect of ERISA and the beneficiary designation are Hayes' property and should be paid to her.

After reviewing the record and the applicable law de novo, as evidenced by some of its explanatory footnotes the Court finds the briefing of the parties somewhat confusing and in need of clarification. The issues here are matters of law: what law applies; whether a nonparticipating ex-wife, designated during her marriage as the beneficiary of life insurance proceeds of the now deceased spouse's employee

benefit plan governed by ERISA, has had her interest in those proceeds nullified by operation of federal common law and the Texas Family Code; or whether she has waived her right to the proceeds through her prenuptial agreement and divorce decree.

In footnote 4, this Court discussed the Fifth Circuit's approach to these issues in the 1994 Brandon case where it, like the other circuits, first concluded that ERISA preempted state law regarding waiver of rights of an ex-spouse beneficiary to ex-husband's employee benefit life insurance proceeds.[9] There is a division of opinion among the courts

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[9] Even in their agreement about the preemptive effect of ERISA regarding designation of beneficiaries in an employee benefit plan, the courts differ in their reasoning. Most turn to 29 U.S.C. § 1144(a), which provides that federal law shall supersede all state laws that "relate to" an ERISA plan and conclude that a designation of beneficiaries "relates to," has a connection with or reference to the ERISA plan and therefore state law is superseded by ERISA. See, e.g., Brandon, 18 F.3d at 1325; Metropolitan Life Ins. Co. v. Pressley, 82 F.3d 126, 129 (6th Cir. 1996), cert. denied sub nom. Pressley v. Pressley, 520 U.S. 1263 (1997); Krushna v. Colgate Palmolive Co., 7 F.3d 11, 15 (2d Cir. 1993); Metropolitan Life Ins. Co. v. Hanslip, 939 F.2d 904, 906 (10th Cir. 1991); Lyman Lumber, 877 F.2d at 693; MacLean v. Ford Motor Co., 831 F.2d 723, 727 (7th Cir. 1987).

Others, such as the Supreme Court in Boggs, 117 S. Ct. at 1756, applies conventional conflict preemption principles that mandate preemption where compliance with both federal and state law interferes with the purposes and objectives of Congress, as evidenced in ERISA. See also post-Boggs Metropolitan Life Insurance Company, 164 F.3d 857, 862-65 (4th Cir. 1998) (finding

regarding the next step in the analysis, i.e., whether ERISA[10] or federal common law supplies the rule of law. As noted, observing that traditionally domestic relations was an area of

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both "relate to" and conflict preemption by ERISA and holding that an ex-wife' effort to impose a constructive trust on deceased ex-husband's life insurance proceeds, based on a domestic relations agreement, interferes with congressional goals in ERISA as well as explicit provision for exception to preemption through "qualified domestic relations orders" ("QDRO") under 29 U.S.C. § 1144(b)(7) to protect former spouse's interest in plan benefits).

[10] The Sixth Circuit has steadfastly insisted that § 1104(a)(1)(D) of ERISA, requiring a plan administrator to administer the plan and discharge his duties "in accordance with the documents and instruments governing the plan," supplies the rule of law and controls in the beneficiary designation area. Thus the plan administrator follows only the statutory language and the plan documents' provisions regarding the designation to determine the beneficiary, and not extraneous documents such as the divorce decree. (A state divorce decree cannot have preclusive effect where the state law is preempted anyway). It reasons that such an approach fulfills Congress' intent that ERISA plans be uniform in their interpretation and simple in their application, as well as allows parties to be certain of their rights and obligations. See generally McMillian v. Parrott, 913 F.2d 310, 311 (6th Cir. 1990); Metropolitan Life Ins. Co. v. Marsh, 119 F.3d 415, 420 (6th Cir. 1997); Metropolitan Life Ins. Co. v. Pressley, 82 F.3d 126, 130 (6th Cir. 1996).

In Brandon, the Fifth Circuit rejected the Sixth Circuit's approach. 18 F.3d at 1325-26. At issue here is whether Boggs implicitly overrules the Fifth Circuit's choice of federal common law, rather than ERISA.

state concern not intruded upon by the federal government, the Fifth Circuit, like most others,[11] applied federal common law, which in turn, if not clear by itself, can draw on and adopt analogous state family law. The Brandon court found that there is a strong presumption that that state law be given precedence in the area of domestic relations. 18 F.3d at 1326. It therefore adopted the Texas rule, embodied within Texas Family Code Annotated § 3.632, creating a presumption of waiver in the absence of redesignation of the ex-spouse as beneficiary after divorce. Id. Nevertheless, it explicitly modified its adoption of the state law "to require that any waiver be voluntary and in good faith." Id.

If, however, a court determines that the federal common law conflicts with ERISA or its underlying policies, it may not apply the federal common law. Mohamed v. Kerr, 53 F.3d 911, 913 (8th Cir. 1995), cert. denied, 116 S. Ct.

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[11] Those circuits, in addition to the Fifth Circuit, applying federal common law for controlling principles in determining beneficiary status because they concluded that ERISA does not explicitly address the issue include the Seventh Circuit in Fox Valley, 897 F.2d at 278-82, and the Eighth Circuit in Lyman Lumber, 877 F.2d at 693, Mohamed v. Kerr, 53 F.3d 911 (8th Cir. 1995), cert. denied, 516 U.S. 868 (1995), and Hill v. AT&T Corp. 125 F.3d 646, 648 (8th Cir. 1997). Both Circuits, like the Fifth, applied federal common law, which allows a decedent's ex-spouse to waive in specific terms her interest as beneficiary of the decedent's insurance plan, in deciding whether the ex-spouse has been divested of her beneficiary interest through a specific divorce decree, property settlement, or documents outside the plan documents operating as a specific waiver of her beneficiary interest.

185 (1995). As the United States Supreme Court sated in Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987), "The expectations that a federal common law of rights and obligations under ERISA-regulated plans would develop . . . would make little sense if the remedies available to ERISA participants and beneficiaries under § 502(a) [29 U.S.C. § 1132(a), the civil enforcement provisions of ERISA] could be supplemented or supplanted by varying state laws." In Boggs (holding that ERISA preempts a Louisiana state community property law allowing a nonparticipant spouse to transfer by testamentary instrument an interest in undistributed pension plan benefits), the Supreme Court found conflict between Louisiana state community property laws and ERISA and held that ERISA preempted the state community property laws even though they implemented "policies and values lying with the traditional domain of the states." 520 U.S. at, 117 S. Ct. at 1761.

Hayes has argued that Boggs changed the law regarding beneficiary interests in ERISA-qualified plan policies. As must be apparent from the paragraph above, Boggs is not factually on point with the case here,[12] and the

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[12] In Boggs, the Supreme Court held that ERISA preempted a testamentary gift based on Louisiana's community property law. 117 S. Ct. at 1760-61. A wife, not a plan participant, died before her participating spouse's retirement. Under her will, her entire estate, including a community property portion of her husband's employee retirement benefits, was divided among her three children. Id. at 1758. The husband subsequently remarried a woman named Sandra, later retired, and then died. Id. The first, deceased wife's three children then sued Sandra over ownership rights to the benefits based on their testamentary gift

conflicts of Louisiana community property law with ERISA that are identified by the Supreme Court are not relevant here. In the instant case, there is no surviving spouse to contest Hayes' claim, and there is no assertion of a community property interest in the life insurance proceeds by Hayes, but rather of a claimed beneficiary interest based on her designation as the beneficiary in the plan documents (and by implication the plan provisions). Nevertheless, after careful review this Court concludes that the method of analysis and pronouncements in Boggs indicate that the correct approach in the instant case is an application of conventional conflict preemption principles and of ERISA alone, and that the

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under the mother's will, seeking a portion of both her survivor's annuity and of benefits paid out during the husband' s retirement. Under Louisiana community property law, the children would be entitled to receive their mother' s one-half community property interest at their father's death. Id. Sandra contended that ERISA preempted the state community property law and that under § 1055 of ERISA, mandating a nonparticipating spouse' s written consent before another beneficiary could be elected, she was entitled to all the benefits. The Supreme Court concluded that § 1055 required that every ERISA plan provide a surviving spouse with an annuity and that that survivor's annuity could not be alienated without the consent of the surviving spouse. Id. at 1761. Sandra had not consented. Furthermore, the Court denied the children's claim to the benefits paid out during the husband' s retirement on the grounds that ERISA's primary purpose is to provide protection for employees and their beneficiaries in employee benefit plans. Id. at 1762. It determined that ERISA narrowly limits a nonparticipating spouse' s beneficiary status. Id. at 1763. Specifically the Supreme Court concluded that a community property interest is limited to § 1056, the QDRO provision, and § 1055, the surviving spouse annuity interest during the survivor's life.

argument for application of federal common law and its modified adoption of Texas law, as well as the result, in Brandon, was incorrect. Thus the issue is the effect of applying ERISA and the terms of the plan here.

In Boggs, reversing the Fifth Circuit affirmance by a divided panel of the district court's summary judgment in favor of the former spouse's community property interest and testamentary transfer and against second wife Sandra Boggs, 117 S. Ct. at 1759, the United States Supreme Court examined the issue of ERISA preemption under the intricate, comprehensive federal statute. Rather than reaching the issue of whether the state community property law "related to" the employee benefit plan or whether there was field preemption, the Supreme Court held that there was a conflict between the community property law and the provisions of ERISA that resolved the case.[13] Id. at 1760-61.

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[13] Initially, in an analysis not directly relevant here, the Supreme Court emphasized that one purpose of ERISA, in particular of § 1055, is to insure economic security to surviving spouses through a stream of income, a goal which would be undermined by permitting a predeceased spouse's sons to have a community interest in the survivor's annuity. It noted that there is nothing in the statute that indicates that Congress intended to allow such a testamentary transfer to reduce the surviving spouse's annuity below the minimum protected by ERISA and points out that even a plan participant cannot defeat a nonparticipant surviving spouse's statutory entitlement to the survivor's annuity under § 1055(c) (2). While not the case in Boggs, the high court indicated that it was concerned that such a testamentary transfer might even be made to a non-family member and the funds funneled elsewhere to support an unrelated stranger. Thus it found a "direct clash between state law and ERISA's provisions and objectives" and

Of significance to the instant case, in determining that the sons' state-law claim to a portion of the survivor's annuity is also preempted, the Supreme Court in Boggs noted that ERISA's principle object was to protect plan participants and beneficiaries. 29 U.S.C. §§ 1001(b) (policy of ERISA is "to protect the interests of participants in employee benefit plans and their beneficiaries") and (c) (ERISA contains safeguards to ensure the "equitable character and the soundness of [private pension] plans" so as to protect "the interests of the participants in private pension plans and their beneficiaries"), 1104(a) (1) (aside from some explicit exceptions, the plan fiduciary must "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries"), 1103(c) (1) (aside from specific exceptions the assets of the plan are "held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan"), 1108(a) (2) (the Secretary of Labor is permitted to create exceptions to certain ERISA prohibitions only if doing so is in the interests of the plan's participants and beneficiaries"), and 1132(a) (1) (B) (only participants and beneficiaries may bring a civil action to recover benefits due him under the terms of his plan). Id. at 1762-63.

The Supreme Court then focused upon and highlighted the fact that ERISA explicitly gives beneficiary status to a nonparticipating spouse or dependent only in narrow

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determined that to the extent that the Louisiana law provided the first, deceased wife's sons with a portion of the surviving wife's annuity, it was preempted. As noted above, since West had no surviving spouse, the conflict and policy concerns expressed in Boggs are not relevant here.

circumstances delineated in its provisions: (1) a survivor's annuity for an existing spouse is required in covered plans under § 1055(a), which cannot be alienated without that spouse's written consent, and (2) when the surviving divorcing spouse obtains a "qualified domestic relations order" ("QDRO") that awards that spouse an interest in the participant's benefits under § 1056(d).[14] Id. at 1763. A

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[14] Section 1056(d), entitled "Assignment or alienation of plan benefits," provides in relevant part:

> (1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated ....
>
> (3)(A) Paragraph (1) shall apply to the creation, assignment or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order.
>
> (B)For purposes of this paragraph--
>
> (i) the term "qualified domestic relations order" means a domestic relations order--
>
> (I) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to,
>
> receive all or a portion of the benefits payable with respect to a participant under a plan, and (II) with respect to which the requirements of subparagraphs (c)

and (D) are met, and

(ii) the term "domestic relations order" means any judgment, decree or order (including approval of a property settlement agreement) which--

(I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and

(II) is made pursuant to State domestic relations law (including a community property law).

(C) A domestic relations order meets the requirements of this subparagraph only if such order clearly specifies--

(i) the name and last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,

(ii) the amount or percentage of the participants benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined,

(iii) the number of payments or period to which such order applies, and

(iv) each plan to which such order applies.

(D) A domestic relations order meets the

requirements of this subparagraph only if such order--

> (i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,
>
> (ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and
>
> (iii) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

(E)(i) A domestic relations order shall not be treated as failing to meet the requirements of clause (i) of subparagraph (D) solely because such order requires that payment of benefits be made to an alternate payee-- . . . .

(F) To the extent provided in any qualified domestic relations order--

> (i) the former spouse of a participant shall be treated as a surviving spouse of such participant for purposes of section 1055 of this title (and any spouse of the participant shall be treated as a spouse of the participant for such purposes) and
>
> (ii) if married for at least 1 year,

> the surviving former spouse shall be treated as meeting the requirements of section 1055(f) of this title.

(G) (i) In the case of any domestic relations order received by a plan--

> (I) the plan administrator shall promptly notify the participant and each alternate payee of the receipt of such order and the plan's procedures for determining the qualified status of domestic relations orders and,
>
> (II) within a reasonable period after receipt of such order, the plan administrator shall determine whether such order is a qualified domestic relations order and notify the participant and each alternate payee of such determination.

> (ii) Each plan shall establish reasonable procedures to determine the qualified status of domestic relations orders and to administer distributions under such qualified orders ....

(K) The term "alternate payee" means any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant.

is statutorily exempted from ERISA's general preemption clause, § 1144(b) (7). The provisions of § 1056(d) (3) (K) are essential to the essential purpose of "giv[ing] enhanced protection to the spouse and dependent children in the event of divorce and separation." Id. The Supreme Court clearly stated, "Apart from these detailed provisions, ERISA does not confer beneficiary status on nonparticipants by reason of their marital or dependent status." Id. The Court further asserted, "The surviving spouse annuity and QDRO provisions, which acknowledge and protect specific pension plan community property interests, give rise to the strong implication that other community property claims are not consistent with the statutory authority." Id. at 1763. The analogous argument can be made in the instant case, i.e., that the express provision of a QDRO as the specified means to protect a divorced spouse's interest, gives rise to the inference that the Texas statute presuming nullification or waiver of the ex-spouse's interest as a designated beneficiary in an ERISA plan or the federal common law's consideration of divorce decrees that fail to meet the standards for a QDRO, is not consistent with the ERISA. The Boggs Court continued, "ERISA's silence with respect to the right of a nonparticipant spouse to control the pension plan benefits by testamentary transfer provides powerful support for the conclusion that the right does not exist." Id. at 1763-63. With regard to the instant case, the QDRO provides the method for a nonparticipant divorcing spouse to protect his or her interests in the benefits under the participating spouse's ERISA plan. Boggs' recognition of the narrow exceptions expressly laid out in ERISA appear to this Court to preempt the Texas statutory presumption and to bar turning to the federal common law's more expansive exceptions, thus by implication overruling Brandon.

In Metropolitan Life Ins. Co. v. Pettit, 164 F.3d 857 (4th Cir. 1998), the Fourth Circuit applied essentially this analysis to a former's wife's suit to impose a constructive trust under state law on life insurance proceeds due under an ERISA qualified plan based on the terms of her divorce property settlement with the insured plan participant. Finding that the state law "related to" the employee benefit plan in that it affected the distribution of plan benefits unlike Boggs, the Fourth Circuit went on to hold that the state law claim was preempted because ERISA's provision for QDROs provided "its own enforcement mechanism for aggrieved former spouses" to secure their beneficiary interest in the plan benefits. Id. at 863. The Fourth Circuit went further in noting that such a conclusion brings the certainty and predictability of the Sixth Circuit's exclusionary emphasis on § 1104(a), mandating that the plan administrator "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and in accordance with the documents and instruments governing the plan." Id. It noted that unlike an external contract such as a property settlement agreement, under § 1056(d) (3) (G) the plan administrator must "receive" the QDRO; therefore he has the ability to determine conclusively who is entitled to the benefits by looking at that single qualifying order. Id. at 863-64 & n.6.

Thus this Court concludes that in Brandon the Fifth Circuit was wrong in turning to federal common law because it concluded that ERISA did not address the question of the ex-spouse's beneficiary status. As noted in Boggs it preserved a current and an ex-spouse's beneficiary and/or community property interest in the participant spouse's plan benefits through narrow statutory provisions in § 1055 and § 1056 for either a survivor's annuity or a QDRO. 117 S. Ct. at 1763.

This Court concludes that ERISA provides the explicit rule of law applicable here. Hayes did not obtain a QDRO, her statutory remedy to protect her beneficiary interest in the plan proceeds in the event that West remarried. An examination of the divorce decree and the prenuptial agreement reveals that they do not satisfy the requirements for a QDRO. "[O]nly QDROs, not domestic relations orders in general, are saved from ERISA's general preemption provision. Pettit, 164 F.3d at 865, citing Boggs, 117 S. Ct. at 1763; Mattei v. Mattei, 126 F.3d 794, 809 (6th Cir. 1997) ("Where there is no QDRO . . . awards of property pursuant to divorce decrees must fall before conflicting designations of ERISA beneficiaries"), cert.denied, 118 S. Ct. 1799 (1998); Marsh, 119 F.3d at 420-21 (holding that ERISA preempts all orders except those that meet the strictures of a QDRO).

Nevertheless, because West did not remarry before he died, ERISA's policy concerns with protecting a second, current spouse do not exist here and therefore Hayes' failure to safeguard her interest with a statutory remedy is not controlling. ERISA is silent about any automatic nullification of a beneficiary interest by divorce, but its statutory provisions for an affirmative act of obtaining a QDRO is necessary for a divorcing nonparticipant spouse to protect his or her interest and written consent from a current spouse to permit alientation of his or her interest imply there is no such automatic rule. The Supreme Court in Boggs stated, "ERISA's silence with respect to the right of a nonparticipant spouse to control the pension plan benefits by testamentary transfer provides powerful support for the conclusion that the right does not exist." Id. at 1763-63.

Thus the Court turns to ERISA and to the terms of West's plan to determine which party is entitled to the proceeds of the plan life insurance policy. The plan documents designate Hayes as the beneficiary. Hayes qualifies as a "beneficiary" under the statute's and the plan's definitions. West had every opportunity to change that designation. Indeed his divorce should have given him obvious notice that he might wish to make such a change, yet he did not. Neither ERISA nor the plan directs who shall be named a beneficiary where there is no existing spouse and no QDRO obtained by a divorced spouse, and the plan participant has full control of the designation, which can be of any party, including his estate. Mindful of the policy concern that ERISA be simple and inexpensive to administer and that an administrator should be able to determine the beneficiary from those documents within his possession, the Court concludes that Hayes remains the designated beneficiary and is entitled under ERISA and the term plans to the proceeds of the life insurance policy.

Both parties have requested an award of attorney's fees under Texas law, which does not apply here. The Court thus construes prevailing Hayes' request as if it had been made under ERISA, 29 U.S.C. § 1132(g) (1). The Fifth Circuit has established the following factors to be considered in the district court's discretionary determination of whether to allow an award of reasonable attorney's fees and costs:

> (1) the degree of the opposing parties' culpability or bad faith;
> (2) the ability of the opposing parties to satisfy an award of attorneys' fees;
> (3) whether an award of attorneys' fees against

> the opposing parties would deter other persons acting under similar circumstances;
> (4) whether the party requesting attorneys' fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and
> (5) the relative merits of the parties' positions.

Iron Workers Local No. 272 v. Bowen, 624 F.2d 1255, 1266 (5th Cir. 1980). See also Pettit, 164 F.3d at 865-66. The preemption law here is complex, controversial, and in need of clarification, as noted. Boggs was a split decision.[15] The Court finds no culpability or bad faith or frivolous arguments by either party, nor is the issues of deterrence yet ripe in view of the uncertain state of the law. There has been no showing of the ability of either party to satisfy an award of attorneys' fees, but since the requests are not enormous, the likelihood is that each is capable of doing so. Basically each party was protecting its own interests, not attempting to benefit others. Both parties made colorable arguments. After considering the matter, the Court denies a fee award.

Accordingly, for reasons delineated above, the Court ORDERS that Defendant Audrey Allyson Hayes's counter motion for summary judgment is GRANTED and Plaintiff Sylvia Manning as Executor of the Estate of Houghton H. West's motion for summary judgment is DENIED.

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[15] Justice Breyer dissented and filed an opinion joined in whole by Justice O'Connor and in part by Justices Rehnquist and Ginsburg.

SIGNED at Houston, Texas, this 4th day of May, 1999.

/s/_____
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Filed May 5, 1999]

CIVIL ACTION NO. H-98-803

SYLVIA MANNING, EXECUTOR OF THE ESTATE OF HOUGHTON H WEST, *Plaintiff*	)
v.	)
AUDREY ALLYSON HAYES, UNUM LIFE INSURANCE COMPANY OF AMERICA, AND FORTIS BENEFITS INSURANCE COMPANY, *Defendant*	)

FINAL SUMMARY JUDGMENT

Pursuant to the memorandum and order signed on this day in the above referenced action, the Court

ORDERS that final summary judgment is GRANTED in favor of Defendant Audrey Allyson Hayes against Plaintiff Sylvia Manning, Executor of the estate of Houghton H.

West, against. Plaintiff shall take nothing and shall bear all costs of court. The Court hereby

DECLARES that Defendant is the beneficiary of life insurance proceeds under West's employee benefit group life insurance policy, No. 373482, issued by Unum Life Insurance Company of America.

THIS IS A FINAL JUDGMENT.

SIGNED at Houston, Texas, this 4th day of May, 1999.

/s/_____
MELINDA HARMON
UNITED STATES DISTRICT JUDGE